

Eagle, Inc. and Pipefitters' Association Local 537, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Case 1-CA-30342

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

Upon a charge filed by the Union on March 29, 1993, and an amended charge filed on May 17, 1993, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on May 24, 1993, against the Respondent, Eagle, Inc., alleging that it had violated Section 8(a)(1) and (5) of the National Labor Relations Act.

On August 18, 1993, the Respondent filed an answer, and on September 1 and 28 filed amended answers to the complaint, admitting in part and denying in part the allegations of the complaint.

On November 4, 1993, the General Counsel filed a Motion to Transfer Proceeding to the Board and for Summary Judgment. On November 8, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent failed to file a response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

The complaint alleges, inter alia, that since about December 1992, the Respondent has failed and refused to furnish the Union with the fringe benefit fund remittance reports for the period of November 23, 1992, to the present, which have become due under the terms of the 1991-1993 collective-bargaining agreement between the Respondent and the Union. The complaint also alleges that the Respondent, since November 23, 1992, has refused to pay health and welfare, pension, annuity, vacation, and education and training fund, fringe benefit amounts which have become due under the terms of the 1991-1993 collective-bargaining agreement.

In its answer and its amended answers the Respondent admits that it has refused to furnish the Union with the fringe benefit fund remittance reports for the period of November 23, 1992, to the present, and which have become due under the terms of the 1991-1993 collective-bargaining agreement. The Respondent also admits that since November 23, 1992, it has not paid the health and welfare, pension, annuity, vacation, and education and training fund, fringe benefit amounts due under the terms of the 1991-1993 collective-bargaining agreement. The Respondent asserts, however,

that "due to its financial standing" it was unable to pay such funds during that time.

The contractual provisions at issue are mandatory subjects of bargaining. A unilateral modification or repudiation of such provisions during a contract term is a violation of Section 8(a)(5). *Rapid Fur Dressing*, 278 NLRB 905 (1986). The Respondent's only defense is that because of its financial standing it was unable to pay funds during that time. It is well established, however, that economic inability to pay does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) by failing to abide by the provisions of a collective-bargaining agreement. *Crest Litho*, 308 NLRB 108 (1992). Accordingly, we find that the Respondent has failed to present a meritorious defense to its unlawful conduct, and grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Winchester, Massachusetts, has been engaged in the business of installing and servicing heating and air-conditioning equipment. Annually, the Respondent, in the course and conduct of its business operations, has purchased and received goods and materials in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts, and has performed services valued in excess of \$50,000 outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including plumbers, pipefitters and apprentices, employed by the Respondent at its facility located in Winchester, Massachusetts, but excluding professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

Since about 1983, and at all material times the Union has been the exclusive bargaining representative of the unit and has been so recognized by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from September 1, 1991, through August 31, 1993. Since about December 1992, and continuing to date, the Respondent has failed and

refused to furnish the Union with the fringe benefit fund remittance reports for the period of November 23, 1992, to the present, which have become due as of that date, and since that date, under the 1991-1993 agreement. Since about November 23, 1992, the Respondent has failed and refused to pay the following fringe benefit amounts for health and welfare, pension, annuity, vacation, and education and training fund, which have become due since that date under the terms of the 1991-1993 agreement. The above-described fringe benefit amounts relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining. The Respondent has engaged in the above-described conduct without the Union's consent.

We find that by the conduct described above the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSION OF LAW

By failing to continue in effect all the terms and conditions of its collective-bargaining agreement with the Union, i.e., by failing and refusing, since December 1992, to furnish the Union with the fringe benefit fund remittance reports and by failing and refusing to pay the following fringe benefit amounts: health and welfare, pension, annuity, vacation, and education and training fund, which have become due as of November 23, 1992, under the terms of the parties' 1991-1993 collective-bargaining agreement the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the fringe benefit fund remittance reports for the period from November 23, 1992, to the present, and by failing and refusing to make contractually required contributions to the health and welfare, pension, annuity, vacation, and education and training fund, we shall order the Respondent to furnish the Union with the fringe benefit fund remittance reports and to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). This shall include reimbursing employees for any contribu-

tions they themselves may have made, with interest, for the maintenance of any fund after the Respondent ceased making the fringe benefit fund payments. *Concord Metal*, 295 NLRB 912 (1989). Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Eagle, Inc., Winchester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Pipefitters' Association Local 537, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, by failing and refusing to furnish the Union with the fringe benefit fund remittance reports for the period from November 23, 1992, to the present, and failing and refusing from November 23, 1992, to pay the health and welfare, pension, annuity, vacation, and education and training fund, fringe benefit amounts due under the terms of the 1991-1993 collective-bargaining agreement. The appropriate unit is:

All full-time and regular part-time employees, including plumbers, pipefitters and apprentices, employed by the Respondent at its facility located in Winchester, Massachusetts, but excluding professional employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give effect to the terms and conditions of employment under the collective-bargaining agreement with the Union.

(b) Make whole, in the manner set forth in the remedy section of this decision, unit employees for any losses resulting from the Respondent's failure to continue in effect the terms and conditions of its collective-bargaining agreement with the Union.

(c) Post at its facility copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 1994

James M. Stephens, Chairman

Dennis M. Devaney, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with Pipefitters' Association Local 537, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, as the exclusive bargaining representative of an appropriate unit of our employees, by failing to continue in effect all the terms of our collective-bargaining agreement with the Union by failing and refusing to furnish the Union with the fringe benefit fund remittance reports for the period from November 23, 1992, to the present, and failing and refusing from November 23, 1992, to pay the health and welfare, pension, annuity, vacation, and education and training fund, fringe benefit amounts due under the terms of the 1991-1993 collective-bargaining agreement. The appropriate unit is:

All full-time and regular part-time employees, including plumbers, pipefitters and apprentices, employed by us at our facility located in Winchester, Massachusetts, but excluding professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL give effect to the terms and conditions of employment of our collective-bargaining agreement with the Union.

WE WILL make whole, with interest, unit employees for any losses resulting from the Respondent's failure to continue in effect the terms and conditions of our collective-bargaining agreement with the Union.

EAGLE, INC.